K Mahunaran v Osmond Chiang Siang Kuan

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22–29 OF 1992
ARIFIN ZAKARIA J
3 MAY 1996

Tort *— Trespass to land — Alteration to party wall — Rights of adjoining house owners over common party wall — Remedies available*

Civil Procedure *— Injunction — Mandatory injunction — Principles applicable in granting injunction*

Words and Phrases *— 'Party wall' — Uniform Building By-laws 1984 by-law 2*

The plaintiff and the defendant are owners of premises Nos 13 and 11 Lorong Alor Akar 20, Taman Sg Karas, Kuantan, respectively. The two premises comprised double-storey terrace houses separated by a common party wall. Between January and June 1989, the defendant concreted the common party wall at the front portion of the premises without the consent of the plaintiff ('the first renovation'). On 28 and 29 January 1992, the defendant constructed a concrete structure upon the existing common party wall ('the second renovation'). The second renovation involved the concreting of part of the common party wall under the car porch of the defendant's house upward to the ceiling. The second renovation was done without the prior consent of the plaintiff and approval of the local authority. The plaintiff lodged a complaint with the Majlis Perbandaran Kuantan ('the local authority') against the second renovation and on 30 January 1992 his solicitor wrote to the defendant giving the particulars of the complaint. On 1 February 1992 the defendant, presumably after the receipt of the letter, phoned the plaintiff and apologized and agreed to demolish the wall after the Chinese New Year. However, there was disagreement between the parties as to when the defendant should demolish the wall. In view of this disagreement the defendant engaged a solicitor and applied to the local authority for approval of the work. On 30 January 1994 the defendant obtained the approval of the local authority subject to the condition that the wall be modified by inserting hollow blocks in part of the wall as indicated in the approved site plan. The defendant duly complied with the said condition. The plaintiff applied for an order that the defendant pull down and remove the wall put up by him and restore the same to its original position or as closely akin thereto. The plaintiff also alleged that the said construction had impeded and affected his light, ventilation and view.

Held, granting the plaintiff's application:

(1) The defendant had committed an act of trespass by demolishing the original party wall and building a new party wall up to the ceiling of the car porch (see p 298F).

(2) The common party wall forms part of the land on which it is situated. The party wall is built on a common boundary which

ownership is divided between plaintiff and defendant, with each of them owning one half of the party wall situated on his side of the land. The defendant's action, without the consent of the plaintiff, constituted a trespass (see p 298D–E).

(3) The approval from the local authority could not justify an act of trespass. It could not be used as a shield by the guilty party against any claim that may be brought by an aggrieved party (see p 298G–H).

(4) On the facts of this case, it appeared that the defendant by his conduct had insisted that it was within his right to construct the wall and having earlier agreed to reinstate the wall to its original state had instead sought to obtain the approval of the local authority for the said construction. This was clearly an attempt on the defendant's part to clothe his illegal conduct with the approval of the local authority. The construction of the wall quite apart of being a trespass on the plaintiff's property was also a source of nuisance to the plaintiff. A mandatory injunction should be granted against the defendant to remove the wall and to restore it to its original state or as closely thereto as possible. Nominal damages of RM500 should also be awarded to the plaintiff (see p 300C–E).

[Bahasa Malaysia summary

Plaintif dan defendan adalah pemilik premis-premis No 13 dan 11 Lorong Alor Akar 20, Taman Sg Karas, Kuantan, masing-masing. Kedua-dua premis berkenaan terdiri daripada rumah teres dua tingkat yang dipisahkan oleh sebuah tembok dua pihak bersama. Di antara bulan Januari dan Jun 1989, defendan telah mengkonkritkan tembok dua pihak bersama tersebut di bahagian hadapan premis-premis tersebut tanpa persetujuan plaintif ('pengubahsuaian pertama'). Pada 28 dan 29 Januari 1992, defendan telah mendirikan satu strukrtur konkrit ke atas tembok dua pihak bersama tersebut ('pengubahsuaian kedua'). Pengubahsuaian kedua tersebut melibatkan pengkonkritan sebahagian tembok dua pihak bersama di bawah anjung kereta rumah defendan sehingga ianya sampai ke silingnya. Pengubahsuaian kedua tersebut telah dibuat tanpa persetujuan plaintiff ataupun kebenaran pihak berkuasa tempatan. Plaintif telah membuat aduan kepada Majlis Perbandaran Kuantan ('pihak berkuasa tempatan') terhadap pengubahsuaian kedua tersebut dan pada 30 Januari 1992 peguamcara beliau telah menulis kepada defendan menyatakan butir-butir aduan tersebut. Pada 1 Februari 1992, defendan, mungkin setelah menerima surat tersebut, telah menelefon plaintif dan meminta maaf dan bersetuju untuk merobohkan tembok tersebut selepas Tahun Baru Cina. Bagaimanapun, mereka telah tidak bersetuju mengenai tarikh yang tepat untuk merobohkan tembok tersebut. Oleh kerana tidak tidak ada perseujutuan, maka defendan telah mengambil khidmat seorang

A ada persetujuan, maka defendan telah mengambil khidmat seorang peguamcara dan memohon kepada pihak berkuasa tempatan untuk mendapatkan kelulusan pembinaan tersebut. Pada 30 Januari 1994 defendan telah memperolehi kebenaran pihak berkuasa tempatan tertakluk kepada syarat bahawa blok-blok berongga dimasukkan dalam sebahagian tembok tersebut, seperti yang ditunjukkan dalan pelan B tempat yang diluluskan. Defendan kemudiannya telah mematuhi syarat itu. Plaintif telah memohon untuk satu perintah agar defendan meroboh dan memindahkan tembok konkrit tersebut ke tempat asalnya ataupun hampir dengannya. Plaintif juga telah mendakwa bahawa pembinaan tersebut telah menghalang dan menjejaskan C cahaya, pengalihan udara dan pemandangannya.

Diputuskan, meluluskan permohonan plaintif:

(1) Defendan telah melakukan satu pencerobohan dengan merobohkan tembok dua pihak yang asal dan membina satu D tembok dua pihak yang baru sehingga ke siling anjung kereta (lihat ms 298F).

(2) Tembok dua pihak bersama membentuk sebahagian daripada tanah yang mana ia terletak. Tembok dua pihak itu telah dibina di atas sempadan bersama yang mana hakmiliknya dibahagikan E di antara plaintif dan defendan, dengan setiap seorang memiliki bahagian tembok tersebut yang terletak pada belah tanahnya. Perbuatan defendan, tanpa kebenaran plaintif, adalah satu pencerobohan (lihat ms 298D–E).

(3) Kelulusan daripada pihak berkuasa tempatan tidak dapat menyokong satu pencerobohan. Ia tidak boleh digunakan sebagai F satu perisai oleh pihak yang bersalah terhadap sebarang tuntutan yang mungkin dibuat oleh pihak yang terkilan (lihat ms 298G–H).

(4) Mengikut fakta kes ini, nampaknya defendan melalui kelakuannya telah menegaskan bahawa adalah menjadi haknya untuk membina tembok itu dan selepas terlebih awal bersetuju mengembalikan G tembok itu kepada keadaan asalnya, telah memohon kelulusan pihak berkuasa tempatan untuk pembinaan itu. Ini jelasnya adalah satu percubaan oleh defendan untuk menutup kelakuan salahnya dengan kelulusan pihak berkuasa tempatan. Pembinaan tembok itu, selain daripada menjadi pencerabohan ke atas hartanah H plaintif, juga merupakan satu punca kacau-ganggu kepada plaintif. Satu injunksi mandatori patut dikeluarkan terhadap defendan untuk mengalihkan tembok itu dan mengembalikannya kepada keadaan asalnya atau sehampir yang mungkin. Ganti rugi nominal sebanyak RM500 juga patut diawardkan kepada plaintif (lihat ms 300C–E).]

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Notes

For cases on trespass on land, see 12 *Mallal's Digest* (4th Ed 1996 Reissue) paras 937–938.

For cases on mandatory injuncton, see 2 Mallal's Digest (4th Ed 1994 Reissue) paras 1656–1661. A

Cases referred to

Kelsen v Imperial Tobacco Co (of Great Britain & Ireland) Ltd [1957] 2 QB 334
Tay Tuan Kiat & Anor v Pritam Singh Brar [1987] 1 MLJ 276 B

Legislation referred to

National Land Code 1965 s 5
Uniform Building By-laws 1984 by-law 2

C

Bastian Pius Vendargon (*Vendargon & Partners*) for the plaintiff.
David Wong (*Andrew & David Wong*) for the defendant.

Arifin Zakaria J: The plaintiff and the defendant are the owners of premises nos 13 and 11, Lorong Alor Akar 20, Taman Sg Karas, Kuantan, D respectively. The two premises comprised double-storey terrace houses separated by a common party wall. The complaint by the plaintiff is with regard to the construction of concrete structure upon an existing common party wall by the defendant on 28 and 29 January 1992. The plaintiff alleged that the said construction has impeded and affected the plaintiff's enjoyment of light, ventilation and view. In the course of the trial it was E established that the work complained of by the plaintiff in this suit is the second of such work carried out by the defendant, the first being the concreting of the common party wall at the front portion of the premises ('the first renovation'). The first renovation was carried out sometime between January and June 1989. F

I shall refer to the work on 28 and 29 January 1992 as 'the second renovation'. From the pleadings the plaintiff did not make any issue of the first renovation even though in the course of his evidence he stated that he did not agree to the said renovation. In view of the pleadings I shall confine myself to the complaint as contained in the pleadings that is as regards the second renovation and I shall not say anything more of the first renovation. G

It is not in dispute that the second renovation was done without the prior consent of the plaintiff and approval of the local authority. The second renovation involved the concreting of part of the common party wall under the car porch of the defendant's house upward to the ceiling. This is clearly shown in defendant's documents, ie IDP1–4 (the area in the H rectangle). It is also not disputed that the defendant's workers did enter the plaintiff's compound to do up the wall with the permission of the plaintiff's maid but without the permission of the plaintiff. The plaintiff did not complain to the defendant, but instead, the plaintiff lodged a complaint with the local authority. On 30 January 1992 the plaintiff's I solicitor wrote to the defendant giving particulars of the plaintiff's complaint against the defendant. For completeness I reproduce below the relevant paragraphs of the said letter which are as follows:

1 On 28 January 1992 and again on 29 January 1992, your servants or agents, acting on your instructions committed trespass on our client's premise, whilst demolishing and rebuilding a common party wall between your house and our client's.

2 You had not obtained our client's consent to the demolition or rebuilding of the common party wall.

3 Your workman had in fact stepped inside our client's premises to effect the aforesaid works.

4 The new wall and structure you have purported to erect has effectively and adversely affected our client's enjoyment and use of his property and is in fact affecting his ventilation, light and aesthetic appreciation of his premises.

On 1 February 1992, the defendant, presumably after receipt of the said letter, telephoned the plaintiff and apologized to the plaintiff and agreed to demolish the wall after the Chinese New Year. However, there was disagreement between the parties as to when the defendant should demolish the wall. The plaintiff, according to the defendant, insisted that the wall should be demolished on the sixth day after the Chinese New Year whilst the defendant requested for time up to the 15th day. In view of this disagreement the defendant said he decided to engage a solicitor and at the same time apply to the local authority for approval of the work. On 30 January 1994 the defendant obtained the approval from the local authority subject to the condition that the wall be modified by inserting hollow blocks in part of the wall as indicated in the approved site plan. The defendant duly complied with the said condition.

The issue in a nutshell is: what are the rights of the adjoining house owners over the party wall? Has there been a breach of those rights in the circumstances of this case, and if so, what are the remedies open to the house owner whose rights have been encroached or injured?

The words 'party wall' have been defined in by-law 2 of the Uniform Building By-Laws 1984 as follows:

> 'party wall' means a wall forming part of a building and used or constructed to be used for separation of adjoining buildings belonging to different owners or occupied or constructed or adapted to be occupied by different persons either constructed over or abutting a common boundary.

From the above definition it may be said that a party wall may be constructed either over or abutting a common boundary. In this case no evidence had been adduced on the question whether the party wall was constructed over or abutting the common boundary of the two houses. However, in the circumstances of this case, I think it can safely be assumed in view of the nature of the houses, that the party wall was constructed over the common boundary.

With that, I shall now seek to determine the legal rights of the parties over the party wall. Counsel for the plaintiff referred me to the book *Boundaries and Fences* by Vincent Powell-Smith (2nd Ed) where the question of a party wall was discussed at some length. The learned author classified a

party wall into three main categories. I reproduce below the relevant passage at p 144 of the book:

> There are now three categories of a party wall. First, and most commonly, where the wall is divided vertically, the whole wall being subject to reciprocal easements. Secondly, where the wall is divided vertically into strips, one belonging to each adjoining owner. Finally, where the wall belongs entirely to one adjoining proprietor, subject to the other's rights to have it maintained as a dividing wall. Each of these three cases requires special consideration.

And at p 147 the learned author went on to explain the rights of the adjoining owners *vis-a-vis* the party wall of the first category. He stated as follows:

> Where a boundary wall is erected partly on the land of two adjoining owners along the boundary line, its ownership follows the land, even though the wall is built at joint expense. It is not subject to joint ownership and each neighbour owns the half on his side ... . In all cases where a party wall is in divided ownership, there is a mutual right of support and neither owner can pull down his portion of the wall so as to disturb the rights of the other. There is nothing to prevent one neighbour demolishing his half of the wall, without negligence, if this does not prejudice any easements enjoyed by the other owner, but he cannot do so, eg, if any existing right of support would be disturbed.

In our National Land Code 1965 ('the NLC') 'land' is defined in s 5 as including, inter alia, 'all things attached to the earth or permanently fastened to anything attached to the earth ... '. Therefore, a party wall, by definition, forms part of the land on which it is situated. On the above premises, it follows that where a party wall is built on a common boundary, as in the present case, the ownership of such wall will be divided between the two adjoining owners, resulting in each of them owning one half of the party wall situated on his side of the land.

In the present case, I find that the defendant had committed an act of trespass by demolishing the original party wall and building a new party wall up to the ceiling of the car porch. The plaintiff had not consented to such work being done to his side of the wall and had in fact protested to the defendant who then promised him that he would pull down the wall sometime after the Chinese New Year in 1992. The defendant, instead of pulling down the wall, had applied to the local authority for approval of the second renovation and the local authority had duly approved the same subject to the defendant inserting some hollow blocks to the wall. I shall pause here, to add that an act of trespass would not cease to be so just because the local authority had chosen to approve the work for their purposes. The approval could not be used as a shield by the guilty party against any claim that may be brought by an aggrieved party. I also wish to remind the local authority to exercise due care and caution in giving approval for work of this nature for it may open itself to unnecessary legal wrangle.

The plaintiff herein firstly asked for an order that the defendant do forthwith pull down and remove the wall put up by the defendant and restore the same to its original position or as closely akin thereto. This in effect is a mandatory injunction and the question is whether it should be granted in the circumstances of this case. It has been said that the power of granting mandatory

injunctions must be exercised with the greatest possible care, but every injunction, whether restrictive or mandatory, ought to be granted with care and caution, and no more care or caution is required in the case of a mandatory injunction than one involving a restrictive injunction. (24 *Halsbury's Laws of England* (4th Ed) para 946).

Learned counsel for the defendant urged me not to grant the injunction asked for as he claimed that the trespass complained of is very trivial in nature and the plaintiff's right of enjoyment of his property had hardly been affected by the alleged trespass. He cited the case of *Tay Tuan Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276 in support. In that case the plaintiff had asked for, inter alia, an order that the retaining wall constructed by the defendant be removed on the ground that the bottom of the retaining wall rested on the plaintiff's property. Thean J refused to make the order for several reasons, among others, that the area of land in dispute was only 11.8 sq m and that the cost to the defendant to demolish the retaining wall was substantial. The learned judge in his judgment at p 279 stated:

> The concept of 'fair result' as one of the criteria in determining the grant of a mandatory injunction was accepted by Megarry J in *Shepherd Homes Ltd v Sandham* where he said, at p 351:
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> > 'Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result", and this involves the exercise of judicial discretion.'

The defendant's counsel argued that in the circumstances of the case, an award of damages would produce a fair result. However, it has been stated that the mere fact that the injury suffered is small is not decisive in deciding whether the court should grant damages or injunction. Each case will depend on its own facts. It is a matter of discretion, in the exercise of which I have to be guided by legal principles. I consider the following statement as a useful guide:

> The power of awarding damages in lieu of an injunction is discretionary and must be exercised with an intimate knowledge of the facts and so as to prevent people being compelled to sell property against their will at a valuation. Moreover, a defendant must not be encouraged to believe that he may do a wrongful act on the payment of a given sum in terms of money. Where a breach of an express covenant is committed, either by the original covenantor or by an assignee who is bound by it, and causes substantial damage, the court has no discretion to award damages in lieu of an injunction. The question whether the defendant knew that he was wrong is of importance. His conduct may be a determining factor in deciding whether to grant an injunction or damages (24 *Halsbury's Laws of England* (4th Ed) para 936).

In *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, an advertising sign erected by the defendants which projected into the airspace above the plaintiff's single-storey shop was held to constitute

a trespass and it was held to be a proper case in which to grant a mandatory injunction. McNair J at p 346 stated: A

> It is true that the injury to the plaintiff's legal rights in this case is small. It has already been stated that this sign in his airspace does him no harm and does not diminish his enjoyment ... . But I cannot find that it would be in any way oppressive to the defendants to grant an injunction ... . Furthermore, I think it is relevant here that the defendants throughout the case have been insisting upon the right to display this advertisement as a matter of right. I think that is a circumstance which the court is entitled to take into account in determining whether a small money payment with a declaration of right should be sufficient or whether an injunction should be granted. Cases in which an injunction has not been granted on the ground of hardship have, I believe, been mostly cases in which there has been some accidental invasion of the plaintiff's rights. B C

Reverting to the facts in the present case, it appears that the defendant by his conduct had insisted that it is within his right to construct the wall and having earlier agreed to reinstate the wall to its original state had instead sought to obtain the approval of the local authority for the said construction. This is clearly an attempt on the defendant's part to clothe his illegal conduct with the approval of the local authority. The approval is of no avail to the defendant. The construction of the wall quite apart of being a trespass on the plaintiff's property is also a source of nuisance to the plaintiff for it has partly prevented the free flow of air to the plaintiff's property and also it has interfered with the plaintiff's right to light. For reasons adumbrated above I granted a mandatory injunction against the defendant to remove the wall that had been constructed and to restore it to its original state or as closely thereto as possible. I further make an award for a nominal damage of RM500 to the plaintiff. The defendant is also ordered to pay the plaintiff's costs. D E

Finally, I hope this case would serve as a warning not only to the defendant but also to all house owners who we so often find in Malaysia are fond of renovating their houses and in so doing accord scant regard is accorded to the neighbours' rights. This unhealthy practice should be put to an end. We have to learn to respect each other's rights if we want to live in a happy and healthy environment. I also hope that the local authorities in this country take stern measures against illegal construction especially where it affects the neighbouring property. The act of giving retrospective approval for illegal construction by the local authority as was done here may be good for public relation but it certainly would not contribute towards educating the public to respect the laws and regulations of the country. I therefore urge the appropriate authority to take a serious view of the conduct of the local authority in giving retrospective approval for illegal construction work. F G H

Application allowed and damages awarded.

Reported by Zahid Taib I